No. 80-203

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J.J. CURRAN and JACQUELYN L. CURRAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* WITH RESPECT TO PETITION FOR A WRIT OF CERTIORARI

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September 5, 1980

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The New York Mercantile Exchange ("NYME") submits this brief as *amicus curiae* and urges this Court to defer consideration of the petition for a writ of certiorari in this action for the reasons stated herein.*

The principal question presented for review by the petition in this action is whether a private cause of action may be implied under § 4b of the Commodity Exchange Act, as amended, 7 U.S.C. § 6b, in favor of a customer against his broker. In the decision below, the Court of Appeals for the

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* Counsel for petitioner and respondents have consented to the filing of this brief. Counsel for petitioner has authorized us to advise the Court that they would acquiesce to proceeding in the fashion suggested here. Counsel for respondents has requested us to advise the Court that he does not consent to deferring consideration of the petition.

Sixth Circuit ruled 2 to 1 that such a cause of action was to be implied. This ruling was the first by any Court of Appeals on whether a private cause of action was to be implied under any section of the Commodity Exchange Act since the Act was amended in 1974.

NYME is one of the appellees in a series of appeals recently decided by the Court of Appeals for the Second Circuit, *Leist* v. *Simplot*, 79-7402, 79-7464, 79-7482. The *Leist* cases were brought by traders in the commodity markets against other traders and their brokers and the NYME, a commodity exchange. A private cause of action was asserted under §§ 4b, 9(b), 5(d) and 5a(8) of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 13(b), 7(d) and 7a(8).

On July 8, 1980, a panel of the Court of Appeals, also in a 2 to 1 decision, reversed the District Court's decision in these cases which held that there was no private cause of action against the brokers or the NYME,* and ruled that a private cause of action was to be implied. The majority's decision was set forth in an 88-page opinion by Judge Friendly. Judge Mansfield wrote a 76-page opinion in dissent.**

NYME and the three broker appellees have filed petitions for rehearing with suggestion for rehearing *in banc*.*** The Court of Appeals has not yet ruled on these petitions.

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* *National Super Spuds* v. *New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979).

** The decision is reported unofficially at CCH Com. Fut. L. Rep. ¶ 21,051.

*** Copies of the petitions for rehearing are included in the Appendix hereto. The petitions briefly set forth the appellees' contentions as to why the majority in *Leist* is in error and reconsideration is warranted. Many of these contentions are equally applicable to the *Curran* decision.

It is anticipated that regardless of the ultimate resolution of the petitions for rehearing, petitions for certiorari will be filed by one side or the other.

The issue of whether a private cause of action is to be implied under various provisions of the Commodity Exchange Act, as amended, is one of extreme importance, which has not been decided by this Court. *Curran* and *Leist* are the only Court of Appeals decisions to consider this issue. The district courts have been divided on the issue. *Curran* arises in the context of only one section of the Act, and the Court dealt with the private cause of action issue *sua sponte* and only briefly as one of several issues before it. The private cause of action issue had not been addressed by the District Court or briefed or argued by the parties before the Court of Appeals. *Leist*, on the other hand, deals exclusively with the issue of implied private causes of action under the Commodity Exchange Act. It addresses several sections of the Act, including the one considered in *Curran*, and the opinions, which total 164 pages, give exhaustive consideration to the issue. With respect to the § 4b claims, *Leist* provides an added dimension because it involves a claim by customers against brokers other than their own, whereas the claims in *Curran* relate to the customers' own broker.

Leist and *Curran* together afford the opportunity for review of the implied private cause of action issue under several key sections of the Commodity Exchange Act. We respectfully suggest that, in order to effect a comprehensive presentation of this important issue and to eliminate the need for duplicate consideration of closely related petitions, the Court defer consideration of the petition for certiorari

in *Curran* until the petitions for rehearing in *Leist* are resolved and petitions for certiorari in *Leist* are filed.

Dated: September 5, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

Petition of New York Mercantile Exchange for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 79-7402, 79-7464 and 79-7482 (CONSOLIDATED)

No. 79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.,

Defendants,

and

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

No. 79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

WAYNE COUNTY PRODUCE CO. and HAROLD COLLINS,

Defendants,

and

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

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No. 79-7482

NATIONAL SUPER SPUDS, INC., et al.,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

and

HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Petition For Rehearing With Suggestion For Rehearing *In Banc*

The decision of the panel rendered on July 8, 1980 addresses an extremely important issue—whether or not a private right of action may be implied on behalf of speculators in commodities under §§ 5(d), 5a(8) and 9(b) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 7(d), 7a(8) and 13(b), against a contract market and its officials.*

Judge Friendly, writing for the majority, in which he was joined by Judge Kearse, concluded in an 88 page opinion that a private right of action does exist under the

* The decision also considers private rights of action against futures commission merchants (brokers) under §§ 4b and 9(b) of the Act, 7 U.S.C. §§ 6b and 13(b).

Act. Judge Mansfield, in a 76 page dissent, limiting his consideration to the provisions of the Act at issue in this case, concluded that a private right of action does not exist. As the majority recognized (4021),* "this important issue has divided the district courts, including those within our circuit." **

The creation of a "significant and potentially devastatig remedy of a private action for damages, under which liability could amount to hundreds of millions of dollars" (Dissent at 4117) is a most serious step. The length of the opinions here and the dichotomy of analysis by the eminent jurists who authored the opinions, as well as the divergent views of other courts, illustrate the difficulty of the issue. In light of the Supreme Court's clearly expressed concern that implied private remedies be limited to those provisions which Congress intended to be enforced by private actions and the importance of the issues here to the commodity industry and the public generally, we submit that rehearing by the full Court is warranted.***

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* Citations are to the slip opinion.

** As recently as July 3, 1980, the Southern District of New York held in a case involving a claim by a customer against his broker under § 4b of the Act that there was no private right of action. *Gonzalez* v. *Paine Webber Jackson & Curtis, Inc.*, 79 Civ. 5724 (HFW). In so doing, the Court declined to follow the recent decision of a divided panel of the Sixth Circuit in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (6th Cir. May 12, 1980), *reprinted in* BNA Sec. Reg. & L. Rep. No. 554 at G-1 (May 21, 1980)), which *sua sponte* upheld a private right of action against a broker under § 4b. It is noted that the *Curran* case dealt with events occurring before the Act was amended in 1974. Until the decision of this panel, no Court of Appeals had ruled on the issue of implied rights of action against contract markets under the Act, as amended; as noted below, only one Court of Appeals had considered the issue before the Act was amended in 1974.

*** The commodity futures trading industry has undergone extraordinary growth in recent years. While the Chicago markets, which traditionally accounted for the bulk of trading (*see* Majority

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Few issues in recent years have captured as much of the attention of both the Supreme Court and the lower federal courts as judicial implication of a private right of action under federal statutes as to which Congress has not seen fit to create an express right. Since *National R.R. Passenger Corp.* v. *National Assn. of R.R. Passengers*, 414 U.S. 453 (1974), decided ten months before enactment of the 1974 amendments to the Act, the Supreme Court has considered implied private remedies no less than eleven times, and except in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) (*"Cannon"*), which presented "the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present" (441 U.S. at 717) (emphasis in original), has in each case refused to imply or narrowed an implied private cause of action.*

In these decisions, the Supreme Court has laid down clear —and stringent—standards for the implication of private rights of action. We submit that the majority's opinion fails to meet these standards.**

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at 4056), still play an important role, the New York markets are becoming a more and more significant factor. It follows that the courts of this Circuit have with increasing frequency become the forum for commodities litigation. As in the securities field, the decisions of this Court will be relied upon for guidance.

* *Kissinger* v. *Reporters Committee for Freedom of the Press*, 100 S.Ct. 960 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (*"Lewis"*); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979) (*"Redington"*); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Cannon; Sante Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Cort* v. *Ash*, 422 U.S. 66 (1975); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975).

** For purposes of the instant petition for rehearing, we discuss herein two basic areas, statutory analysis and the standards of

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1. While making reference to various statutory provisions at issue, it is clear that the majority has implied a private remedy "under the Commodity Exchange Act" (4072) on the basis of its analysis of the Act taken as a whole and of decisions concerning sections not relevant here, rather than of the specific sections of the Act at issue. Indeed, the majority fails entirely to consider the language of the specific sections. As the dissent points out (4114), under the Supreme Court's guidelines, private rights of action can only be implied on a section by section basis in light of the statutory language. *See Lewis*, 444 U.S. at 19-20; *Redington*, 442 U.S. at 571-72.

2. The majority suggests that the issue here is not whether Congress intended to create a private right of action, but whether it intended to deny one, which, the majority finds, had been previously implied by the courts (4061). The majority furthermore places the burden on the defendants to demonstrate Congress' intent to deny an implied right (4062). We believe that the majority's underlying premise with respect to prior uniform recognition by the courts of implied rights is in error, particularly with respect to the sections at issue here. (*See* dissent at 4146 *et seq.*) But more importantly, we submit that the standard adopted by the majority of requiring defendants to demonstrate that Congress affirmatively intended to repeal judicially created implied rights is not the proper one. To the contrary, as pointed out by Judge Mansfield in

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legislative intent, as to which we believe the majority has misapprehended the Supreme Court's guidelines. Other aspects of the majority's decision also merit reconsideration. For example, as discussed at length in the dissent (4108, 4131-4141, 4145), the statutory provisions at issue cannot be shown to be for the especial benefit of speculators.

dissent (4111), the standard required by the Supreme Court is an affirmative showing by plaintiffs of Congressional intent to favor an implied right, a showing wholly lacking here. *See Lewis*, 444 U.S. at 15-16; *Redington*, 442 U.S. at 568; *Cannon*, 441 U.S. at 688.

1. *Statutory Analysis*

With respect to the New York Mercantile Exchange (the "Exchange") and its officials, the relevant statutory provisions are §§ 5(d), 5a(8) and 9(b).* Analysis must begin "with the language of the statute itself." (*Redington*, 442 U.S. at 568) "[A]bsent a clearly expressed legislative intention to the contrary," the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S.Ct. 2051, 2056 (1980) (*see* Dissent at 4117).

Section 5(d), enacted in 1922, is a licensing provision. It is directed not at exchanges but at the Commodity Futures Trading Commission (the "Commission"), as the successor to the Department of Agriculture, which is authorized to designate an exchange as a contract market when it complies with certain conditions. Section 5a(8), enacted in 1968, provides that exchanges "shall" enforce their rules. Like the statute at issue in *Redington* (442 U.S. at 569), sections 5(d) and 5a(8) create no rights in favor of anyone. "In those circumstances it was evident to the Court that no private remedy was available." (*Lewis*, 444 U.S. at 24).

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* Although § 9(b) is discussed in the opinion, and we accordingly consider it herein, it is not clear that any claim is being made against the Exchange or its officials under § 9(b). As demonstrated by the majority's summary of the complaints in the various actions (Majority at 4029-39), none of the plaintiffs has alleged manipulation on the part of the Exchange or its officials.

Section 9(b), enacted in 1922, is a criminal provision, and makes it a felony to manipulate or attempt to manipulate the price of a commodity. Like the statute in *Lewis*, section 9(b) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." (*Lewis*, 444 U.S. at 19)

The majority ignores the language of the statutory provisions on which plaintiffs predicate their causes of action against the Exchange. But the language of these provisions is clear. They do not create private rights or identify a beneficiary class, or suggest any intent on the part of Congress to provide a remedy to private parties.

2. *Legislative Intent*

Rules of construction may yield to "persuasive evidence of a contrary legislative intent" (*Lewis*, 444 U.S. at 20). Here, however, the legislative history of the Act, in 1922 when sections 5(d) and 9(b) were enacted,* in 1968 when section 5a(8) was enacted,* and in 1974 when the Act was "completely overhauled" (Majority at 4058 n.17) does not contain one word approving a private right of action. (Dissent at 4108-09)

What the legislative history does show is that in the 1922 hearings, reports and debates, there is *no* mention in any context of a private cause of action for damages.

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* In *Redington*, the Supreme Court pointed out that the determinative legislative intent is that of Congress at the time of enactment of the statute (442 U.S. at 575 n.16). *See also Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.11 (1979); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979). The majority wholly ignores the legislative history of sections 5(d), 5a(8) and 9(b). This gives rise to an anomalous situation, as the 1974 legislative history, on which the majority relies, contains no discussion or consideration of these provisions. The legislative history in 1922 and 1968, at the time of the enactment of these provisions, contains absolutely no mention of an implied private right of action.

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In 1968, a bill was introduced specifically providing a private cause of action for damages against commodity exchanges.* It was rejected. (See Dissent at 4145-46 and n.11)

In 1974, Congress expressly created a private civil remedy for damages, the reparations procedure (7 U.S.C. § 18). The reparations procedure is a streamlined administrative proceeding, available to "all persons", including plaintiffs in these actions. It was intended to and does provide victims of manipulation or fraud with full damage recovery. Exchanges were excluded from liability under the reparations procedure, but were subject to extensive regulation by the Commission and a panoply of judicial and administrative sanctions. *See* §§ 5b, 6(a), 6b, 6c, 8a(7), 8a(9), 8c, 7 U.S.C. §§ 7b, 8, 13a, 13a-1, 12a(7), 12a(9), 12c. (*See* Dissent at 4120-21, 4145)

While enacting the reparations procedure and providing for plenary regulation of and sanctions against exchanges, Congress rejected two proposed private causes of action for treble damages, and one proposed provision for actual damages for non-wilful and treble damages for wilful violations.** (*See* Dissent at 4158-59) As in *Redington*, when Congress wished to provide a private damage remedy for violations of the Act, "it knew how to do so and did so expressly." (442 U.S. at 572) In *Redington* the court was "extremely reluctant" to imply a cause of action "significantly broader than the remedy that Congress chose to provide." (442 U.S. at 574) Where Congress had before it and failed to enact, in 1968 and 1974, provision for the

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* H.R. 9178, 90th Cong., 1st Sess. § 32 (1967).

** H.R 11195, 93d Cong., 1st Sess. § 17(3) (1973) and S. 2578, 93d Cong., 1st Sess. § 20(3) (1973); S. 2837, 93d Cong., 1st Sess. § 505 (1973).

express private remedy which the Court has been asked to imply, inference of a private cause of action is precisely the sort of "judicial legislation" which the Court cautioned against in *Redington.**

Against this, the majority points to ten lower court cases, decided between 1967 and 1974, "upholding a private right of action under the pre-1974 Act" (Majority at 4054-55). The majority then says that "Congress was aware of the uniform judicial recognition of private rights of action under the Commodity Exchange Act," and that "[n]o amount of labored parsing can obscure the self-evident truth that Congress knew the courts were implying private rights of action and did nothing to alter this." (Majority at 4072, 4075)

Because the majority does not focus on the particular substantive provisions under which plaintiffs are seeking to bring their actions against the Exchange and its officials, it considerably overstates the "uniform judicial recognition" of private rights of action.

No pre-1974 case implied a private cause of action for damages on behalf of anyone under sections 5(d) or 5a(8).

Only two pre-1974 cases implied a private cause of action for damages under § 9(b). One was decided only four months before the 1974 amendments were enacted and held that a broker-dealer, not a customer or trader or an off-market dealer (as is one of the plaintiffs here),** could

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* As we pointed out in our brief to the panel (at pp. 22-23), such "judicial legislation" would raise constitutional questions. (*See Redington*, 442 U.S. at 2490-91; *Cannon*, 441 U.S. at 731 (Powell, J., *dissenting*))

** As noted above (page 4n), we do not agree with the majority's conclusion that the provisions at issue are for the "especial" benefit of speculators. While we do not endeavor to discuss the point

bring an action against an exchange. *Seligson* v. *New York Produce Exchange*, 378 F.Supp. 1076 (S.D.N.Y. 1974). The only case implying a private cause of action for damages in favor of a trader against an exchange was decided one year before enactment of the 1974 amendments. *Deaktor* v. *L.D. Schreiber & Co.*, 179 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).*

The other pre-1974 cases implying a private cause of action for damages were decided under § 4b of the Act, the antifraud provision, and were brought by customers against their broker-dealers, and not by speculators

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herein, we do feel constrained to point out that the majority's opinion is so sweeping as to extend even beyond speculators. The majority recognizes that the claim of Incomco in 79-7464 was that it planned to sell cash potatoes to futures traders. (Majority 4034) Its claim in that action is not as a futures trader itself. Yet, while finding that the Act is for the "especial" benefit of "futures traders" (Majority 4070), the majority holds that it was for the "especial" benefit of all plaintiffs, including Incomco.

* The majority views the Supreme Court's reversal in *Deaktor* as providing support for implication of a private remedy under the Act. (Majority at 4057) In fact, *Deaktor* expressly declined to reach this issue. (414 U.S. at 115) As Justice Powell stated recently:

> "'[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans* v. *Lavine*, 415 U.S. at 533, n.5; see *Monell* v. *Dept. of Social Services of the City of New York*, *supra*, 436 U.S. at 663. *United States* v. *More*, 3 Cranch 159, 172 (1805). This rule applies with even greater force to questions involving the availability of a cause of action, because the question whether a cause of action exists—unlike the existence of federal jurisdiction—may be assumed without being decided. *Burks* v. *Lasker*, 441 U.S. 471, 476, and n.5 (1979)." *Maine* v. *Thiboutot*, 48 U.S.L.W. 4859, 4867 (June 25, 1980) (Powell, J., *dissenting*).

against an exchange with which they had no relationship.* (*See* Dissent at 4152).

Before 1974, then, a private cause of action for damages, on behalf of speculators like plaintiffs, against an exchange was not "uniformly recognized", but rather had been upheld by only one court in one case decided one year before enactment of the 1974 amendments." ** And neither *Deaktor* nor any other case was discussed by or cited to Congress as implying a private remedy. (Dissent at 4110)***

Moreover, the majority overstates Congressional awareness in 1974 of judicially implied private remedies. In thousands of pages of reports, debates, and testimony, there are only scattered references to a private cause of action, and they are in no way approving or definitive.†

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* The Supreme Court has made clear, in the securities context, that even when an implied private remedy is available, it is not available to all plaintiffs in all situations. *See, e.g., Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 463 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

** It is further noted that *Deaktor* relied on the statutory tort concept developed in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33 (1916), which the Supreme Court found "entirely misplaced" in *Redington*. (442 U.S. at 568) Nevertheless, the majority here continues to place emphasis on *Rigsby* and its progeny (4051, 4052, 4063, 4101). "[S]ince it is abundently clear that the few pre-1974 decisions were erroneous, being based on the theory of tort rather than Congressional intent, it is unreasonable to suppose that Congress, absent a Supreme Court ruling, intended to compound the error by tacitly giving effect to them." (Dissent at 4182)

*** See *Aaron* v. *SEC*, 48 U.S.L.W. 4609, 4615 n.18 (June 1, 1980), where the Supreme Court noted that in the absence of any indication that Congress was "even aware of" a court decision, "much less that it approved of that decision," it cannot fairly be inferred in that Congress intended to adopt the decision.

† *See* Dissent at 417-4162 and Hearings Before the Senate Committee on Agriculture and Forestry on S.2484 *et al.*, 93d Cong., 2d Sess. 205, 369, 737 (1974); H.R. Rep. No. 93-975 93d Cong.,

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The majority's premise—that there was a long standing uniform judicial implication of private rights of action, and that this was recognized by Congress—is thus inaccurate. The majority's contention, flowing from this erroneous premise, that it must be shown that Congress intended to deny a previously implied private right rather than create or approve a private right, is unacceptable. As recognized by the dissent (4111), in *Cannon*, *Redington* and *Lewis*, the Supreme Court required an affirmative showing of Congressional intent to favor a private remedy. In *Redington*, the Court rejected the argument of SIPC "that because Congress did not express an intent to deny a private cause of action under § 17(a), this Court should infer one." 442 U.S. at 571. It concluded that "[i]mplying a private cause of action on the basis of Congressional silence is a hazardous enterprise at best." 442 U.S. at 571.

There is no support for the reverse standard adopted by the majority which would require a showing of Congressional disapproval of an implied right.*

2d Sess. 46, 48 (1974); 119 Cong. Rec. 41333 (Dec. 13, 1973); Hearing on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture, 93d Cong., 1st Sess. 121 (1973); Hearings on H.R. 11955 Before the House Committee on Agriculture, 93d Cong., 2d Sess. 123, 249, 321 (1974).

* *Lorillard* v. *Pons*, 434 U.S. 575 (1978), *Georgia* v. *United States*, 411 U.S. 526 (1973), and *Van Vranken* v. *Helvering*, 115 F.2d 709 (2d Cir. 1940), *cert. denied*, 313 U.S. 585 (1941), relied on by the majority, are simply not relevant to the issue here. "'[T]he well-recognized canon of statutory construction that the reenactment of a statute incorporates preceding judicial interpretations'" (Majority at 4078, *quoting from Van Vranken*, 115 F.2d at 710) applies only to the interpretation of a statute, which is a function of the courts, and not the creation of statutory remedies, which is the role of Congress. And it only applies when the judicial

We submit that rehearing is necessary and we suggest that rehearing in banc is warranted.

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interpretation is longstanding or pervasive, not, as here, a single year-old precedent (*Deaktor*). As the dissent points out (4177-4178), in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), the Supreme Court made clear that even where a judicially created remedy has been uniformly recognized, Congress must affirmatively approve the remedy before it will be treated as if "enacted". *See also SEC* v. *Sloan*, 436 U.S. 103 (1978); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *NLRB* v. *A.P.W. Products Co.*, 316 F.2d 899 (2d Cir. 1963). *Cf.* the discussions of the majority and dissent at 4079-4080, 4097 n.39, and 4177-4181.

APPENDIX B

Petition of Heinold Commodities, Inc. for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 79-7402 and 79-7482

NATIONAL SUPER SPUDS, INC., et al.,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

NEIL LEIST, PHILIP SMITH and INCOMCO,

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Defendants-Appellees.

Appendix B

PETITION OF DEFENDANT-APPELLEE HEINOLD COMMODITIES, INC., FOR REHEARING EN BANC

Defendant-Appellee Heinold Commodities, Inc. hereby petitions the Court for rehearing en banc of the decision in these cases entered by a majority of the panel on July 8, 1980. Rehearing en banc is appropriate and desirable because (i) the issue involved is of extraordinary importance to members of the commodity futures industry, to futures traders, and, indeed, to the public at large; (ii) the issue has sharply divided the district courts, including those within this district, the panel which decided the question on July 8, 1980, and the only other court of appeals addressing the question, *Curran* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (6th Cir. May 12, 1980); (iii) the majority of the panel seriously misapplied the principles of statutory construction established by the Supreme Court in particularly *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *Cort* v. *Ash*, 422 U.S. 66 (1975); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 100 S.Ct. 242 (1979); and (iv) an erroneous decision of this Court may have a particularly serious, adverse impact on the development of the law relating to futures trading.

STATEMENT OF THE CASE

These cases arise out of trading in May 1976 Maine Potato Futures Contracts ("May Contracts") on the New York Mercantile Exchange ("Exchange"). Plaintiffs are

speculators who held long positions in May Contracts which were liquidated prior to the close of trading on May 7, 1976. None of the plaintiffs are customers of the brokerage firms named as defendants in these actions. Defendant Exchange is a commodities exchange designated as a "contract market" for the purchase and sale of certain commodity futures contracts including the May Contracts.

Defendants Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., Clayton Brokerage Co. of St. Louis, and Pressner Trading Corp. are commodity futures brokerage firms registered as futures commission merchants with the Commodity Futures Trading Commission ("CFTC") ("short brokers"). Customers who traded through these defendants held short positions in May Contracts and are defendants in these actions ("short sellers").

The complaints in these actions allege that the short sellers and their brokers engaged in a conspiracy to manipulate downward the price of the May Contracts in violation of sections 4a, 4b, and 9(b) of the Act (7 U.S.C. §§ 6a, 6b, and 13(b)) and sections 1 and 2 of the Sherman Antitrust Act and that the Exchange failed to reveal and prevent this manipulation in violation of sections 5(d), 5a(8), and 9(b) of the Act (7 U.S.C. §§ 7(d), 7a(8) and 13(b)).*

In its opinion, the majority of the panel held, contrary to the decision of the District Court (470 F.Supp. 1256 (1979)) and over the dissent of Judge Mansfield, that these plaintiffs have an implied right of action for damages under the Commodity Exchange Act as amended, (the "Act") (7 U.S.C. § 1 *et seq.*) against futures commission

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* A liberal more detailed recitation of the facts alleged by plaintiffs may be found in the majority opinion.

merchants such as the short brokers despite the existence of powerful judicial and administrative means of enforcing the provisions of the Act, including express administrative remedies for plaintiffs' claims against futures commission merchants. The reasons why the majority opinion is incorrect and plainly at odds with the principles to be applied in determining whether Congress intended to create a private cause of action where none is expressly provided are set forth in the dissenting opinion of Judge Mansfield. Because of the great importance of the issues presented, en banc consideration is fully warranted.

ARGUMENT

I. The Majority Erred in Ruling That Because Congress in 1974 Failed Expressly To Repeal The Cause of Action Found to be Implied in Certain Provisions of the Act By A Number of Lower Federal Courts, It *Sub Silentio* Approved and Adopted The Erroneous Decisions of These Courts

The majority's opinion relies heavily on the familiar "canon of statutory construction that the reenactment of a statute incorporates preceding judicial interpretations" citing *Van Vranken* v. *Helvering*, 115 F.2d 709, 710 (2d Cir.), *cert. denied*, 313 U.S. 585 (1940) and several other cases which bear no resemblance to the cases at bar. Slip Opinion at 4078. The majority's argument is that Congress was aware in 1974 that various lower federal courts had found an implied private cause of action in several provisions of the Act and that Congress' failure in the face of these decisions to repudiate the rule enunciated therein is evidence of an intent *sub silentio* to approve and adopt the rule. Slip Opinion at 4061-4062, 4078-4080.

This argument is wholly without merit for the many reasons stated in the dissenting opinion of Judge Mansfield (Slip Opinion at 4109-4118, 4146-4157, 4168-4169, 4177-4183).*

Moreover, the canon must not stand in the way of the courts to correct erroneous doctrine. As the Supreme Court wrote in *Helvering* v. *Hallock*, 309 U.S. 106, 119-121 (1940):

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* The majority fails to point out that in *Van Vranken*, *supra*, the court, in refusing to apply the canon to the circumstances there present, emphasized that:

> "The canon which the taxpayer invokes is sometimes a help, but we must never ignore the more important, though impalpable, factors. Indeed, nothing is so likely to lead us astray as an abject reliance upon canons of any sort; so much the whole history of verbal interpretations teaches, if it teaches anything." (115 F.2d at 711)

In addition, the canon on which the majority places so much stock is generally invoked only to attribute to Congress acceptance of Supreme Court statutory interpretations. See *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this court to such language and made it a part of the enactment.' That judicial construction is made up of the doctrines enunciated by this Court. . . ."); *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924); *Sessions* v. *Romadka*, 145 U.S. 29, 42 (1892). Moreover, although federal regulation of futures trading began as early as 1922, not until 1967, after 45 years of regulation but only eight years before the 1974 amendments to the Act, did a district court erroneously hold, based on the theory of tort rather than congressional intent, that a private action could be maintained under the Act. Thus, as Judge Mansfield points out:

> "[I]t is inappropriate to rely on the presumption asserted by the majority where, as here, Congress has expressly created a number of remedies which may reasonably be viewed as exclusive and where, if Congress intended to adopt a prior judicial interpretation providing for an additional remedy, it would have said so. ***Finally, the body of earlier lower federal court decisional law provides a wholly inadequate basis, either in terms of relevance, weight, period of existence, or notoriety, for such an inference.***"

"Nor does want of specific congressional repudiations of the *St. Louis Union Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine.

It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction . . . of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

In *Girouard* v. *United States*, 328 U.S. 61 (1946), the Supreme Court refused to apply the cannon in a case where the judicial precedent supposedly approved and adopted by Congress in its reenactment of legislation was three Supreme Court decisions. These decisions had been wrongly decided by the Court and the erroneous doctrine announced therein would not be presumed to have been adopted by Congress. The decision of the Supreme Court is worth quoting at length:

"We conclude that the *Schwimmer*, *Macintosh* and *Bland* cases do not state the correct rule of law.

We are met, however, with the argument that, even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to

amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, when the Nationality Act of 1940 was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the *Schwimmer, Macintosh* and *Bland* cases. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 488-489.

We stated in *Helvering* v. *Hallock*, 309 U.S. 106, 119, that 'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' *It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error.*" (*Girouard, supra*, 328 U.S. at 69-70; emphasis added).

Thus, the majority has no support for its presumption that Congress intended to approve and adopt the incorrect decisions of a number of lower federal courts because it failed expressly to repeat the erroneous rule announced in those cases.

II. The Majority Erred in Applying The Principles of Statutory Construction To Be Used In Determining Whether Congress Has Implied a Private Cause of Action

Not only does the majority improperly place the burden of disproving the existence of an implied private cause

of action on appellees (Slip Opinion at 4061-4062, 4078-4080),* but, in addition, it erroneously rejects the substantial evidence found in the language, regulatory scheme, and legislative history of the statute which shows that Congress did not have an unexpressed intent to create such a remedy in favor of any person let alone plaintiffs in these cases.

The majority, for example, accords little weight to the very language of the provisions on which plaintiffs base their claims** and to Congress' desire to the extent possible to assure natural uniformity in the development of standards governing futures trading.*** In addition, it ignores the lack of any general grant of jurisdiction to the federal courts to enforce the provisions of the Act. In

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* Judge Mansfield correctly described the burden of proof and the parties with whom this burden rests: "the burden is on appellants to show an affirmative Congressional intent to favor an implied private right." (Slip Opinion at 4111). *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). As Justice Powell stated: "Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action." *Cannon* v. *University of Chicago*, 441 U.S. 677, 731 (1979) (Powell, J., dissenting).

** *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976); *Transamerica, supra*, 100 S.Ct. 242 (1979); *Touche Ross & Co., supra*, 99 S. Ct. at 2485 (1979); *Southeastern Community College* v. *Davis*, —— U.S. ——, 99 S.Ct. 2361, 2369 (1979); *Cannon* v. *University of Chicago, supra*, 441 U.S. 677 (1979); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 24 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

*** *See, e.g.*, S.Rep. No. 95-850, 95th Cong., 2d Sess. 13, 26 (1978); H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 14, 16, 28 (1978).

sharp contrast, the Securities Exchange Act of 1934 contains a general grant of jurisdiction (15 U.S.C. §78aa). In *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 424 (1975), the Supreme Court, in holding that no private right of action was implied in the statute there at issue, emphasized the importance of such jurisdictional language: "Unlike the Securities Exchange Act, the SIPA . . . contains no general grant of jurisdiction to the district courts." Moreover, in *Transamerica, supra*, 100 S.Ct. at 248 n.12, the Supreme Court stated that the omission of certain jurisdictional language was "inconsistent more generally with an intent on the part of Congress to make [a private cause of action for damages] available". Here, Congress omitted entirely any general grant of jurisdiction.*

Where Congress intended to invoke the jurisdiction of the District Courts, Congress made express provision in the Act. Under Section 6 (7 U.S.C. §13a-1), the Commission and the Attorney General of the United States are empowered to sue in district court to enjoin violations of the substantive provisions of the Act. Moreover, in 1978, Congress added a provision empowering States to sue in law or equity in District Court for violations of the Act (7 U.S.C. §13a-2).

Moreover, as Judge Mansfield states in his dissenting opinion:

> "The legislative history of the Act, which runs into hundreds of pages of Committee reports, testimony and debates, fails to contain one word approving a

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* See, in addition, *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-31 (1964) where the Supreme Court specifically cited Section 27 (15 U.S.C. §78aa) as an important factor in implication of a private remedy.

right of action, despite reference by a couple of witnesses and a senator to the subject. On the contrary, in 1974 congress failed, after exhaustive hearings, to enact any one of several bills which would have expressly provided a private right of action for violations of the Act. . . . In 1968 Congress had rejected a bill which would have made *contract markets* liable to aggrieved persons for violations of the Act. . . . Moreover, the enactment of a reparations procedure whereby any person injured by a violation of the Act can recover compensatory damages, § 14, and its legislative history, shows not only that "Congress knew how to confer a private right of action when it wished to do so," *Transamerica, supra,* 100 S. Ct. at 248 n.13, but that Congress viewed the reparations procedure, along with the other expressly provided remedies, as sufficient to protect those aggrieved by violations of the Act. H.R. Rep. No. 975, 93d Cong., 2d Sess. 22, 83 (1974). In this respect the Act differs sharply from the Securities Exchange Act of 1934, 78 U.S.C. §§ 78, *et seq.*, relied upon by the majority. . . .')" (Slip Opinion at 4108-4109)

Despite this strong evidence that Congress did not intend to create a private cause of action, the majority erroneously chooses to rely upon (i) snippets of testimony which by no stretch of their language reveal Congressional approval of a private cause of action, (ii) an unfair, strained reading of a "savings clause," and (iii) a presumption based upon Congressional silence expressly to repeal erroneous case law.

III. The Majority Erred in Its Seriously Strained Reading of Section 4b

By its terms, section 4b, contrary to the majority's ruling, is intended to prohibit a broker from cheating or defrauding his customer in connection with the making of a futures contract. See Slip Opinion at 4126-4130, Mansfield, J., dissenting. As stated in *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1065 n.7 (5th Cir. 1979): "Section 4b makes it unlawful for a commodities broker 'to cheat or defraud' a *customer* or willfully to deceive or make false statements or reports, to a *customer* in connection with transactions in the commodities exchange." (Emphasis added)

Because the language of section 4b indicates that it was intended to protect only customers against fraud on the part of brokers acting on their behalf, "it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it plainly seems to say." *Aaron* v. *Securities & Exchange Comm'n*, 48 U.S.L.W. 4609, 4614 (June 2, 1980). But the legislative history contains no such clear expression of contrary congressional intent. Indeed, the legislative history establishes beyond cavil that section 4b was intended only to protect a customer from the cheating or fraud of his own broker. The 1934 House Report on what was to become Section 4b states:

> "Section 4b prohibits traders in acting for *customers* in futures transactions to cheat, defraud, or deceive *customers*, or to bucket or offset such orders against orders for others. H. R. Rep. No. 1637, 73d Cong., 2d Sess. 5 (1934). (Emphasis added).

The 1935 House Report confirms that interpretation:

> "Section 4b makes it unlawful for members of contract markets, and correspondents, agents, and employees thereof, in connection with orders to make or the making of contracts of sale of any commodity in interstate commerce to cheat, defraud, or deceive the *customer*, or to bucket the order." H. R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). (Emphasis added).

See, in addition, S.Rep. No. 947, 90th Cong., 2d Sess. 6 (1968); 113 Cong. Rec. 23651 (August 22, 1967) (remarks of Congressman Hathaway).

Hence, the majority erred in holding that section 4b confers a private cause of action upon these plaintiffs, none of whom are customers of the short brokers, against the short brokers.

IV. The Majority Erred in Holding That Section 9(b) of Act, A Criminal Provision Which By Its Terms Simply Proscribes Certain Conduct and Does Not Create Or Alter Any Civil Liabilities, Gives Rise to A Private Cause of Action

Section 9(b) provides:

> "It shall be a felony . . . for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity. . . . "

Thus, as with Section 206 of the Investment Advisors Act, Section 9(b):

> ". . . simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If mon-

etary liability to a private plaintiff is to be found, it must read it into the Act." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 100 S.Ct. 242, 247 (1979); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223, 4226 (March 3, 1980).

The majority is completely unable to plumb from the legislative history of the Act a scintilla of evidence that Congress intended to provide any person with a private cause of action for violation of Section 9(b). As Judge Mansfield put it:

> ". . . § 9(b) like § 4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors. In any event, even assuming *arguendo* that this criminal statute benefits speculators, there is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act." (Slip Opinion at 4141-4142).

Accord, Liang v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979).

V. The Majority Erred in Holding That Section 4a of the Act Gives Rise To A Private Cause of Action

Section 4a of the Act (7 U.S.C. § 6a) was enacted in 1936 to authorize federal regulatory authorities to set limits on speculative trading. As Judge Mansfield's dissent points out, nowhere in the language of this section or in its